United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

BP/s

74-1582

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1582

JOHN J. GALGAY, as Trustee in the Reorganization of R. Hoe & Co., Inc.,

Plaintiff-Appellant,

—v.—

BULLETIN COMPANY, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFF-APPELLANT JOHN J. GALGAY, AS TRUSTEE

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Preliminary Statement

This brief is respectfully submitted in reply to some of the arguments contained in defendant's brief relating to the interpretation of facts and law germane to this appeal. Most of defendant's arguments have already been dealt with in plaintiff's main brief; however, defendant has given such a distorted interpretation to the undisputed facts and relevant law that clarification is in order.

POINT I

The Proposal Cannot Be Construed as a Contract

Contrary to defendant's assertion that plaintiff brought this action upon a contract made in Pennsylvania (Def. Br. p. 1), the District Court, after considering defendant's lengthy supplemental memorandum which was belatedly filed on this single point, assumed that the contract was executed in New York (App. 50a), without the slightest mention of defendant's strained argument that execution of an earlier "proposal" constituted execution of the final contract. The Court's assumption finds ample support in the record.

The language of the December 14, 1966 "proposal" (Supp. App.) in no way suggests that the parties intended that writing to represent their final assent to an agreement. On the contrary, the language of the proposal indicates that it was merely a stage in the preliminary negotiations for the sales Agreement which was subsequently executed. The writing clearly envisioned counter-proposals on the part of defendant. The second paragraph of the proposal (Supp. App. 1b) qualifies the prices that follow, with the clear implication that defendant could elect an alternate price structure depending upon the method of shipment and assembly of the equipment. Moreover, inclusion of five options in the proposal (Supp. App. 4b-5b) demonstrates that Hoe could not have intended the writing as anything more than an instrument for defendant's use in placing an order or making an offer to purchase given items of equipment.

This view finds ample support in the text of the proposal where it is stated, *inter alia*:

"Prices quoted herein are net f.o.b. our plant at New York, New York and are firm provided:

1) We have the pleasure of receiving your *order* on or before December 15, 1966;

2) And, *if favored with your order,* unless we are prevented from completing manufacture and shipment within the time stipulated due to circumstances such as, but not limited to, war, national emergency, insurrection or riot, acts of the public enemy or saboteurs, government acts, regulations or directives, or by some act or delay on your part. In such event, the parties in the *Agreement* will confer and agree upon a revision of the above selling prices that will reasonably reflect the changes, if any, in the basic costs of producing the equipment under those altered circumstances." (emphasis added)

The language refers to and characterizes acceptance of the proposal as an "order" (clearly synonymous with the term "offer" in this context) and contemplates further negotiations with respect to the final written "Agreement." Moreover, although a method of payment is suggested, again defendant is given the clear option of choosing another. Surely, this language is subject to but one interpretation.

The proposal could not specify the total purchase price, nor the method of payment considering the fact that Hoe did not know what the defendant might purchase. Hence, until defendant submitted the "proposal-order" Hoe could not accept or reject the terms and conditions desired by defendant, and cannot be said to have given its final assent.

The final, and perhaps most important consideration in an analysis of the proposal language is the fact that

the proposal specifically contemplates the formal written Agreement that followed defendant's order (Supp. App. 7b); a factor given considerable weight by this Court and New York State courts when called upon to determine parties' intentions under similar circumstances. *Banking & Trading Corp.* v. *Floete,* 257 F. 2d 765 (2d Cir. 1958). This view finds its best expression in § 25 Restatement of the Law of Contracts:

> "If from a promise or manifestation of intention, or of the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent he has made no offer."

The most conclusive evidence supporting the foregoing construction can be found in the defendant's own correspondence. On January 6, 1967 almost a month after defendant elected certain terms and conditions contained in the proposal, defendant's representative wrote:

> "Dear Ray:
>
> With reference to your Proposal on new press equipment dated December 14th, 1966, *as amended* to reduce the number of units to eight, you have indicated that you wish a confirmation of our decision to elect to use the Underside Lock-Up feature.
>
> *Since we have made a definite decision to use Underside Lock-Up, this letter will serve as your authority to proceed on this basis which is Option number 1 on your Proposal.*
>
> We have similarly elected to proceed on Options number 2, and number 4 as indicated by the initialed entries on your signed copy of the Proposal.

It is my understanding that the price for Skip-Slitters has been eliminated and that the Variable Count Electric Kicker is to be included with the 2:1 Folder as well as with the 3:2 Folder.

At your convenience, *we would like to have a meeting at The Bulletin in order to review all of the minor details such as; compensators, columns, etc.*" (App. 46a-47) (emphasis added)

Thus, on January 6, 1967 the parties had not finalized items to be purchased, or their price. The letter reflects that negotiations were continuing and that subsequent meetings to iron out details were contemplated.*

An additional letter written by defendant's representative serves to illustrate the construction given the proposal by defendant. In the first paragraph of a January 23, 1967 letter written by Mr. Albert Spendlove, defendant's Vice-President and Business Manager to Mr. Mangieri, a representative in Hoe's Contract Administration Division (App. 34a-35a), defendant's understanding and intent concerning the earliest proposal is made crystal clear; it states, that he is forwarding a purchase order for the machinery, suggesting in very clear terms that receipt of the same by Hoe will represent the parties' final assent. Further on, in the second paragraph a change in the written "Agreement" is suggested to conform it with the understanding reached in earlier negotiations. The text of this letter firmly establishes that no prior agreement had been reached while characterizing earlier efforts as "discussions and proposals."

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* The letter also reflects, that although defendant may not have come into New York to negotiate terms, the manufacture of this "custom machinery" was to be closely directed by defendant through correspondence and telephone communication.

It is, therefore, quite clear from a literal reading of the proposal and the defendant's own correspondence that final assent to an agreement was not given by either party until February 2, 1967, the date that the "Agreement" was executed by Hoe in New York.

Finally, it should be noted that this issue is no more than a red herring drag into this case by defendant to confuse and cloud the real issues. The basis of this litigation is the February 2, 1967 Agreement (the "Agreement"). Defendant does not deny execution of that Agreement nor that the alleged breach occurred under it. Whether or not defendant's earlier expressions manifest an intention to agree is irrelevant to a determination of the operative Agreement's connection with New York.

A. *Execution in New York Determinative Factor*

New York Courts have sustained jurisdiction under § 302(a)(1) where an action arises out of a contract executed in New York. *Nexsen* v. *Ira Haupt & Co.*, 44 Misc.2d 629, 254 N.Y.S.2d 637 Sup. Ct. Nassau County 1964) (contracts executed in New York and to be performed in New York sufficient). In *Patrick Ellam, Inc.* v. *Nieves*, 41 Misc.2d 186, 188, 245 N.Y.S.2d 545, 547 (Sup. Ct. Westchester County 1963), the court stated:

> "The cause of action asserted by the plaintiff is breach of contract. In the opinion of the Court, the making of such a contract in New York is a sufficient transaction to bring the defendant within the scope of Section 302(a) of the Civil Practice Law and Rules. While it may be argued that the breach of the contract occurred somewhere along the Atlantic Coast and outside the State of New York, the Court considers the making of the contract in New York and

> the arising of a cause of action out of such contract as sufficient to validate the service of process effected herein."

Hence, the governing consideration is where the contract was finally made, and as a general principle the "time and place of the making of the contract is established when the last act necessary for its formulation is done, and at the place where the final act is done." *Fremay Inc.* v. *Modern Plastic Machinery Corp.*, 15 App. Div.2d 235, 222 N.Y.S.2d 694 (1st Dept. 1961); *Hoard* v. *U.S. Paint Lacquer & Chemical Co.*, 44 Misc. 2d 72, 253 N.Y.S.2d 89, 90 (Sup. Ct. Monroe County 1964). In the case at bar Hoe's execution of the agreement in New York constituted final acceptance, and such execution is a decisive factor in determining jurisdiction under § 302(a)(1).

POINT II

Defendant Availed Itself of the Benefits and Protections of New York Law

In *Agrashell, Inc.* v. *Bernard Sirotta Co.*, 344 F.2d 583, 588 (2d Cir. 1965), this court clearly held that where the risk of loss reposes in the non-resident while goods pass through New York, and at the same time it appears that such non-resident has a proprietary stake in the safe operation of the trucks carrying such goods, that such non-resident would be enjoying the benefits and protections of New York law and therefore subject to jurisdiction under Section 302(a)(1):

> ". . . Sirotta alleges that these shipments were f.o.b. New York and were carried in trucks owned or leased by Hammons. If these contentions are correct, Ham-

> mons was presumably transacting business in New York within the meaning of Section 302(a)1. The risk of loss would seem to have been on Hammons while the goods were passing through New York on the way to Sirotta's place of business, and at the same time Hammons would also seem to have had a proprietary stake in the safe operation of the trucks. Accordingly, Hammons would have enjoyed the benefits and protections of New York law in an overt physical manner." *Agrashell, supra* at 588.

Defendant attempts to meet this point by arguing that the agreement is vague or ambiguous with respect to the f.o.b. point, and that Hoe bore risk of loss until the machinery arrived in Philadelphia. (Def. Br. pp. 10-11) This argument is patently incorrect and exemplifies the convoluted analysis underlying most of defendant's brief.

Defendant refers to paragraph 12 of the Agreement (App. 27a) which requires defendant to insure the machinery upon receipt at its facilities until the defendant has satisfied all obligations to Hoe. It is clear from this provision and paragraphs 10, 11, 13 and 14 of the Agreement (App. 26a-28a) that Hoe was laying a foundation for perfection of a secured interest in the machinery in case of defendant's default in payment.

Moreover, defendant's reliance on paragraph 12 to illustrate Hoe's burden is fatal; the last sentence in the paragraph states:

> "Risk of loss or damage to the machinery herein, from fire, flood, or from any other cause whatsoever, at any time after shipment and until such insurance is effective, *shall be borne and assumed by the Buyer, it being understood and agreed that the Carrier to which the*

machinery herein is delivered by Hoe shall be the 'agent' of the Buyer for all purposes." (App. 27a) (emphasis added)

This reference evinces the difficulty defendant has throughout its brief with the obvious implications of the contract provisions, which clearly provide for the defendant to bear the risk of loss [not the carrier] upon the carrier's receipt of the machinery (for a complete analysis of the f.o.b. provisions, see Agreement, paragraphs 3, 5, 6, 12 and 18—App. 24a, 25a, 27a-28a).

Defendant next suggests that even if it did rely on the benefits and protections of New York law by assuming the risk of loss, such reliance is to be judged in terms of the miles traveled in New York and the time required to traverse the distance. The first glimpse of the misleading nature of this argument can be seen in Mr. Spendlove's affidavit, where he states that the machinery was shipped in segments. There is but one interpretation to be given to this statement; *there was more than one isolated shipment by defendant's carrier.* Unfortunately, the record is silent with respect to the number of shipments, but certainly there were several.

Defendant's attempt to characterize its representative's activities in New York as minimal must fail for an additional reason. These activities constitute "transaction of business" in New York for the benefit of defendant, and in furtherance of defendant's obligations under the Agreement. Hence, the quantitative significance of these activities is irrelevant. This principle was succinctly stated in *Schneider* v. *J and C Carpet Co., Inc.,* 23 A.D.2d 103, 104-105, 258 N.Y.S.2d 717, 718 (1st Dept. 1965):

> "We are not, under this section, concerned with the theory of minimal contacts, so as to hold a corporation is 'doing business' within the State, and hence subject to jurisdiction on any cause of action, whether or not related to the business transacted. The test under § 302(a)(1) CPLR is not whether there are sufficient contacts, but simply whether the defendant has transacted any business within the State, so long as the cause of action arises from any such transaction." (cite omitted)

Moreover, the cases cited by defendant where New York courts have failed to consider the f.o.b. point significant (Def. Br. pp. 12-13), can, and indeed should be distinguished from the case at bar. In all of those cases the transaction was one of a series of similar transactions between the parties wherein a non-resident buyer phoned or delivered an order to a New York seller for stock goods to be delivered to the buyer outside of New York. Upon receipt of the order the seller entrusted the goods to a "common carrier" for delivery. In the case at bar, the parties negotiated an elaborate contract for the manufacture of custom built press equipment. It is apparent from defendant's correspondence that this manufacturing process was monitored and partially directed by defendant through correspondence and other communication; delivery was made pursuant to express contract provisions which stated that the carrier would be considered defendant's agent (App. 27a). The carrier was, unlike the cases cited by defendant, hired specifically for the purpose of transporting defendant's goods to its facility. Hence the facts and circumstances in the present case provide a clear basis for distinguishing the case at bar from those cited in defendant's brief. Even beyond this distinction, however, is

the common sense observation that defendant would not in the real world entrust a one million dollar shipment of equipment to a carrier over whom it had no control. Thus, the facts in the present case do satisfy all of the prerequisites set forth in *Agrashell, supra* at 558; risk of loss was on defendant while the goods traveled through New York and at the same time the defendant would "have had a proprietary stake in the safe operation of the trucks." Accordingly, defendant "enjoyed the benefits and protection of New York law in an overt physical manner."

POINT III

D. F. Bast Activities in New York Must Be Imputed to Defendant

In a suit by a third party who deals directly in New York with an "agent" of a non-resident defendant, a true agency is not required to establish jurisdiction. (Main Br. p. 8). As noted by Dean McLaughlin in his analysis of footnote 2* from *Parke-Bernet Galleries, Inc.* v. *Franklyn,* 26 N.Y.2d 13, 308 N.Y.S.2d 337 (1970) appearing in his Supplementary Practice Commentaries to § 302, 7B *McKinney's Cons. Laws of N.Y.,* Cumulative Pocket Suppl. for 1973-1974, § C.302.3, p. 10:

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* *Parke-Bernet, infra,* p. 19 (n.2)

> "The present case differs materially from others, relied upon by the defendant, in which we have denied jurisdiction. . . . It is sufficient to point out that in each of those cases, all of which involved agents who were suing their principals, the plaintiff was relying on his own activities within the State, and not those of the defendant, as the basis for jurisdiction. In other words, in no one of these cases had the defendant himself engaged in purposeful activity within the State nor had the cause of action arisen out of transactions with third parties conducted through an agent."

"Another possible construction of the Parke-Bernet footnote is that in a suit by a third party who dealt with the 'agent' in New York a true agency is not required. For example in Legros v. Irving, New York Law Journal, May 22, 1973, p. 18, col. 4, Clifford Irving wrote a book based upon the life of Elmyr deHory. deHory furnished Irving with much of the information in the book and he reserved the right to read the manuscript and to delete objectionable passages. Plaintiff, alleging that he was libeled in the book, sued deHory and asserted jurisdiction upon the theory that deHory had transacted business in New York because of the activities of Clifford Irving in this state.

"Wrestling valiantly with the cases, Justice Gellinoff concluded that 'the Court of Appeals has noted that "realities" rather than formal agency requirements are the test when a third-party seeks to base jurisdiction over the non-resident defendant on the acts of his purported agent . . .' The Court found that Irving had acted 'for the benefit of, and with the knowledge and consent of deHory, and deHory retained some element of control over Irving's activities.' Jurisdiction was accordingly sustained. To the same effect, see Glens Falls Ins. Co. v. Stephens, New York Law Journal, June 20, 1973, p. 16, col. 5.

"Synthesizing the cases, the following conclusions appear to emerge: (1) When an action is brought by a so-called 'agent' against his principal the activities of the agent in New York will not be attributed to the non-domiciliary defendant for purposes of CPLR 302; (2) a fortiori, the activities of an independent contractor will not be attributed to the non-domiciliary in an action between the contractor and the non-domiciliary; and (3) *when the action is between a third party who dealt with a representative of the non-domiciliary in this state, the activities of that representative will be imputed to the non-domiciliary when he requested the*

performance of those acts in New York and those acts benefit him, and this is true without regard to whether the representative is an agent or an independent contractor." (emphasis added)

In *Glens Falls Insurance Company* v. *Stephens,* New York Law Journal, June 20, 1973, p. 16, col. 5 (App. Div., 1st Dept.) cited by McLaughlin above, the Court found that where defendant, a resident of Westchester, hired an insurance broker who also resided in Westchester to obtain insurance and that broker procured the desired coverage from a New York City broker (plaintiff), the activities of the broker and sub-broker in New York City were sufficient to confer jurisdiction of the New York City courts over the non-resident defendant, under § 302(a)(1). In so holding the Court set forth principles which must be applicable to the present circumstances:

"*Patently an insurance broker has the implied authority to take all steps necessary to obtain the insurance coverage which he has been hired to procure. It is a fair inference that defendant's primary interest centered on securing insurance coverage for his benefit.*

* * *

"Examination of the record herein and the briefs submitted on this appeal impels the conclusion that the litigants and the court below assumed the relationship between the broker and defendant to be one of agent and principal. However, even if the relationship is viewed as one of independent contractor, the circumstances warrant the upholding of jurisdiction. This action is between a third party contracting with the principal through the medium of the principal's brokers . . . We merely hold that New York City is the proper forum . . . when as here the circum-

stances before the court indicate a purposeful activity by defendant's brokers in New York City presumably for his benefit." *Id.* (cite omitted) (emphasis added)

Thus, as pointed out in our main brief, characterization of defendant's representative is not the determinative factor. The primary consideration is whether such representative's actions constitute purposeful activity in New York for the sole benefit of the non-resident defendant. The circumstances of the case at bar allow for no other determination. Moreover, *Glens Falls, supra,* clearly indicates that consent and knowledge of acts by a sub-agent or subcontractor can be imputed to a non-resident defendant by the implied authority delegated to an agent, or contractor, such as Hall to take whatever steps it deems necessary to effectuate the non-resident's purposes. Indeed, defendant is not claiming that the acts of Bast were unauthorized but rather uncontrolled. It would, however, offend even the most insensitive notions of reality to believe, as pointed out earlier, that defendant had no control over a subcontractor acting on its behalf with regard to a one million dollar shipment of machinery. At the very minimum, defendant would have had to control the schedule and manner of shipments so as to permit the smooth transition between the operation and disposal of its old equipment with that of the delivery and installation of the new equipment.

Therefore, regardless of whether the Court finds the acts of Bast to be those of a sub-contractor or sub-agent, the fact that Bast entered New York for the sole benefit of and with the consent and knowledge of defendant is sufficient to confer jurisdiction.

Furthermore, Bast's actions in New York were in furtherance of defendant's performance under the Agreement, in that defendant was required to arrange and bear responsibility for shipment of the goods. Hence, defendant was required to rely heavily upon the benefits and protections of New York law in performance of its obligations under the Agreement. As noted by McLaughlin in his Practice Commentaries to § 302(a)(1):

> "Where a non-domiciliary physically comes to New York or sends an agent into the state, it is one of the most concrete manifestations of his purposeful activity in New York. In most cases it would ill-behoove a defendant, who had voluntarily come to New York to transact business for profit, to assert later that New York lacks a sufficient interest to adjudicate a controversy arising out of that transaction or even to claim that trial in New York would be inconvenient.
>
> "Particularly is this true where the defendant's presence in New York is to perform, as opposed to negotiate or execute, the contract. In the performance stage the consideration which had been promised is now rendered, the benefits of New York law are relied upon to protect the interests of both parties, and the risk of injury to the parties—not to mention strangers—is at its peak." McLaughlin, Practice Commentaries to CPLR § 302, 7B *McKinney's Consol. Laws of N.Y.* § C 302.10, at p. 74.

Indeed, some New York Courts have found that consummation of the Agreement in New York is the determinative factor. *Steel* v. *DeLeeuw,* 40 Misc.2d 807, 244 N.Y.S.2d 97 (Sup. Ct. Nassau County 1963); In *Iroquois Gas Corp.* v. *Collins,* 42 Misc.2d 632, 634-635, 248 N.Y.S.2d 494, 497 (Sup. Ct. Erie County 1964), *aff'd mem.,* 23 App.Div.2d 823, 258 N.Y.S.2d 367 (4th Dept. 1965) the Court stated:

> "Where a contract is made in this state and a cause of action arises out of such contract, the consummation of the contract in New York constitutes the transaction of business . . . ."

Certainly performance in New York by both parties of substantially all of the terms of the Agreement should suffice to satisfy all jurisdictional prerequisites under § 302(a)(1).

POINT IV

Cases Cited by Defendant Are Not on "All Fours" With the Case at Bar

Finally defendant states throughout its brief that numerous cases which it cites are "on all fours" with the present case. (Def. Br. pp. 13, 19, 21). These assertions defy rational analysis, considering the fact that no case cited by defendant or decided under § 302(a)(1) has ever considered and decided circumstances where a domicilary seller is suing a non-resident buyer purely on breach of a sales agreement for the custom manufacture and delivery of goods. *See,* 1 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 302.06a n. 52f. p. 70. Hence, this case is not on all fours with the cases cited by defendant and should be decided solely upon the basis of the facts presented in this record.

POINT V

The Agreement Has Substantial Connection With New York

Defendant continually alludes to Hoe's failure to understand the underlying distinction between choice of law provisions and the relevant consideration in the determination of "transaction of business" within a forum.

It is axiomatic that for a court to find the "transaction of business" in New York by a non-resident defendant based upon a contract, the contract must have "substantial connection" with New York so that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." See *McGee* v. *International Ins. Co.*, 355 U.S. 220, 222 (1957).

Obviously, consideration must be given to some of the same factors in determining the Agreement's connection with New York, that might be important in a conflict of laws, "center of gravity" analysis. That is not to say, however, that the concepts are interchangeable. Dean McLaughlin in his Practice Commentaries on § 302 points up the vast differences between the two concepts:

> "The 'center of gravity' concept which has become so important in conflict of laws is not fungible with the concept of 'minimum contracts' for jurisdictional purposes; the former may dictate the choice of the law of one state to the complete exclusion of all others, while the latter may permit several states to assert personal jurisdiction over the defendant. The test in deciding whether jurisdiction may be asserted is not whether this forum is the most convenient one to litigate the controversy. Rather, the question is whether

> the assertion of jurisdiction in the forum will violate due process. There is a world of difference between the two." McLaughlin, Practice Commentaries to CPLR § 302, *McKinney's Consol. Laws of N.Y.*, Book 7B, at p. 82.

While we have graphically illustrated that execution of the Agreement was connected with New York and that performance of the Agreement by Hoe and defendant had connection with New York, New York Courts have, contrary to defendant's assertions (Def. Br. pp. 17-18) also considered additional factors, such as; a choice of law provision in an agreement, *Nexsen* v. *Ira Haupt & Co., supra;** payment mailed into New York, *G. Benedict Corp.* v. *Epstein*, 47 Misc.2d 316, 262 N.Y.S.2d 726 (Sup. Ct. Albany County 1965); and the amount of the transaction, *Fashion Two Twenty, Inc.* v. *Steinberg*, 339 F. Supp. 836, 837 (E.D. N.Y. 1971).

Although none of these factors alone may be sufficient to result in the invocation of jurisdiction under § 302(a)(1), when coupled with the execution in New York and performance of the Agreement in New York they compel such a result.

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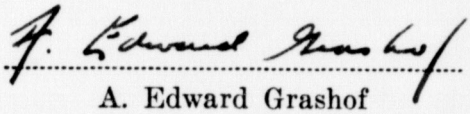
* It should be noted that there is absolutely no authority for the proposition that the election of New York law to govern enforcement of a contract is irrelevant to jurisdictional considerations under § 302(a)(1). The quote from *Agrashell, supra* in defendant's brief (p. 17) does not use the term "relevant" but rather "decisive", meaning that a determination could not be made upon that basis alone. Inherent in any courts' consideration of this factor is the obvious observation that it has some significance, however slight.

CONCLUSION

The order and judgment of the District Court dismissing the complaint should be in all respects reversed.

Respectfully submitted,

WINTHROP, STIMSON, PUTNAM & ROBERTS

By 

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